


1 PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY2 Name Sunday, Roman Sr. (Last) (First) (Initial) MAR - 4 20083 Prisoner Number V-11338 RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND4 Institutional Address P.O. BOX 40005 VACAVILLE, CA 95696-4000 1-106U6  
7 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA8 Roman Sunday, Sr., )  
9 Petitioner, )10 vs. )  
11 D.K. SISTO, Warden, )  
12 Respondent. )Case No. C-07-5308 SBA (PR)  
(To be provided by the clerk of court)PETITION FOR A WRIT  
OF HABEAS CORPUSFirst Amended Petition

14 (Enter the full name of respondent(s) or jailor in this action)

Read Comments Carefully Before Filling InWhen and Where to File18 You should file in the Northern District if you were convicted and sentenced in one of these  
19 counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa,  
20 San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in  
21 this district if you are challenging the manner in which your sentence is being executed, such as loss of  
22 good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).23 If you are challenging your conviction or sentence and you were not convicted and sentenced in  
24 one of the above-named fifteen counties, your petition will likely be transferred to the United States  
25 District Court for the district in which the state court that convicted and sentenced you is located. If  
26 you are challenging the execution of your sentence and you are not in prison in one of these counties,  
27 your petition will likely be transferred to the district court for the district that includes the institution  
28 where you are confined. Habeas L.R. 2254-3(b).

1 Who to Name as Respondent

2 You must name the person in whose actual custody you are. This usually means the Warden or  
 3 jailor. Do not name the State of California, a city, a county or the superior court of the county in which  
 4 you are imprisoned or by whom you were convicted and sentenced. These are not proper  
 5 respondents.

6 If you are not presently in custody pursuant to the state judgment against which you seek relief  
 7 but may be subject to such custody in the future (e.g., detainees), you must name the person in whose  
 8 custody you are now and the Attorney General of the state in which the judgment you seek to attack  
 9 was entered.

10 A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

11 1. What sentence are you challenging in this petition?

12 (a) Name and location of court that imposed sentence (for example; Alameda  
 13 County Superior Court, Oakland):

14 Contra Costa County Superior Court 725 Court St., Martinez, CA

	Court	Location
15		
16	(b) Case number, if known	<u>101480-2</u>
17	(c) Date and terms of sentence	<u>9/12/03, 75 years to life + 11.</u>
18	(d) Are you now in custody serving this term? (Custody means being in jail, on	
19	parole or probation, etc.)	Yes <u>XX</u> No <u>      </u>

20 Where?

21 Name of Institution: \_\_\_\_\_

22 Address: \_\_\_\_\_

23 2. For what crime were you given this sentence? (If your petition challenges a sentence for  
 24 more than one crime, list each crime separately using Penal Code numbers if known. If you are  
 25 challenging more than one sentence, you should file a different petition for each sentence.)

26 Cal. Penal Codes: §187, §207(a), §205(b), §12022(a)(1),  
 27 §12021(a)(1), §667(a)(1), 667(b)(1), §1170.12.

1                   3. Did you have any of the following?

2                   Arraignment:                   Yes XX           No \_\_\_\_\_

3                   Preliminary Hearing:           Yes XX           No \_\_\_\_\_

4                   Motion to Suppress:           Yes XX           No \_\_\_\_\_

5                   4. How did you plead?

6                   Guilty \_\_\_\_\_ Not Guilty XX           Nolo Contendere \_\_\_\_\_

7                   Any other plea (specify) \_\_\_\_\_

8                   5. If you went to trial, what kind of trial did you have?

9                   Jury XX           Judge alone \_\_\_\_\_           Judge alone on a transcript \_\_\_\_\_

10                  6. Did you testify at your trial?                   Yes \_\_\_\_\_           No XX

11                  7. Did you have an attorney at the following proceedings:

12                  (a)           Arraignment                   Yes XX           No \_\_\_\_\_

13                  (b)           Preliminary hearing           Yes XX           No \_\_\_\_\_

14                  (c)           Time of plea                   Yes \_\_\_\_\_           No \_\_\_\_\_

15                  (d)           Trial                           Yes XX           No \_\_\_\_\_

16                  (e)           Sentencing                   Yes XX           No \_\_\_\_\_

17                  (f)           Appeal                           Yes XX           No \_\_\_\_\_

18                  (g)           Other post-conviction proceeding           Yes XX           No \_\_\_\_\_

19                  8. Did you appeal your conviction?                   Yes XX           No \_\_\_\_\_

20                  (a)           If you did, to what court(s) did you appeal?

21                  Court of Appeal                           Yes XX           No \_\_\_\_\_

22                  Year: 2005           Result: Judgment Affirmed # (A104520).

23                  Supreme Court of California                   Yes XX           No \_\_\_\_\_

24                  Year: 2005           Result: Denied, See Exh. A (#S135861)

25                  Any other court                           Yes XX           No \_\_\_\_\_

26                  Year: 2007           Result: Denied, See Exh. A; (#S152252)

27                  (b)           If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes XX No \_\_\_\_\_

2 (c) Was there an opinion? Yes XX No \_\_\_\_\_

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes \_\_\_\_\_ No XX

5 If you did, give the name of the court and the result:

6 \_\_\_\_\_  
 7 \_\_\_\_\_

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to  
 9 this conviction in any court, state or federal? Yes XX No \_\_\_\_\_

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that  
 11 challenged the same conviction you are challenging now and if that petition was denied or dismissed  
 12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit  
 13 for an order authorizing the district court to consider this petition. You may not file a second or  
 14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28  
 15 U.S.C. §§ 2244(b).]

16 (a) If you sought relief in any proceeding other than an appeal, answer the following  
 17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: Contra Costa County Superior Court

19 Type of Proceeding: "Motion for New Trial"

20 Grounds raised (Be brief but specific):

21 a. Trial Counsel's conflict of interest

22 b. \_\_\_\_\_

23 c. \_\_\_\_\_

24 d. \_\_\_\_\_

25 Result: denied Date of Result: 9/12/03

26 II. Name of Court: Contra Costa County Superior Court

27 Type of Proceeding: Habeas Corpus Petition

28 Grounds raised (Be brief but specific):

1 a. Newly acquired evidence/Miscarriage of Justice  
2 b. Ineffective Assistance of trial Counsel  
3 c. \_\_\_\_\_  
4 d. \_\_\_\_\_

5 Result: Denied Date of Result: 12/21/06

6 III. Name of Court: California Court of Appeals Div Five

7 Type of Proceeding: Writ of Habeas Corpus.

8 Grounds raised (Be brief but specific):

9 a. Newly acquired evidence/missscarriage of justice  
10 b. Ineffective assistance of trial counsel.  
11 c. \_\_\_\_\_  
12 d. \_\_\_\_\_

13 Result: Denied Date of Result: 4/18/07

14 IV. Name of Court: California Supreme Court

15 Type of Proceeding: Writ of Habeas Corpus

16 Grounds raised (Be brief but specific):

17 a. Newly acquired evidence/missscarriage of justice  
18 b. Ineffective assistance of trail counsel.  
19 c. \_\_\_\_\_  
20 d. \_\_\_\_\_

21 Result: denied See Exh. A infra Date of Result: 9/12/07

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes \_\_\_\_\_ No X

24 Name and location of court: \_\_\_\_\_

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to  
27 support each claim. For example, what legal right or privilege were you denied? What happened?  
28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

CLAIM ONE: PETITIONER'S CONVICTION FOR MURDER AND KIDNAPPING WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN CONTRAVENTION OF PETITIONER'S DUE PROCESS RIGHTS TO THE UNITED STATES CONSTITUTION.

Supporting Facts: The historical record adduces insubstantial "independent" evidence to sustain guilty verdicts. It is well established an accomplice cannot corroborate another accomplice's testimony. There must be independent evidence standing alone i.e., inculpatory evidence [physical or other witnesses] that is the nexus to the accomplice testimony that evinces the accused committed the substantive offense.

The state court opined, multifarious examples of independent corroboration: (1) petitioner spoke of Blair in the past tense; (2) petitioner asserted Roman Jr. never left home after 10:00 p.m. and interrupted Robert Moore [Blair's Grandfather] while he was inquiring about Blair's whereabouts; (3) petitioner spoke with the police about being displeased that crimes were being committed against Roman Jr. and his own residence. Ostensibly, this evidence linked petitioner to the killers and the opportunity to participate.

The substantial evidence rule demands evidence that is credible, that of solid value. Surmise and conjecture do not rise to that level. Moreover, none of the reasons posited connect petitioner to the crime, only to the accomplices. Notwithstanding, Roman Jr. is petitioner's son and Shelton Eaves one of Roman's friends. Clearly, an "unreasonable" decision in light of evidence presented to the state-court, requiring reversal. [28 U.S.C. 2254(d)(2)]

CLAIM TWO: PETITIONER WAS DENIED HIS GUARANTEED RIGHT TO CONFLICT FREE COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Supporting Facts: Subsequent to verdict petitioner lodged a motion for new trial. Newly appointed substitute counsel proffered *inter alia*, petitioner was denied his Sixth Amendment right to counsel predicated on his trial attorney had previously represented petitioner's son, [Roman Jr.] a key prosecution witness, on the same charge for which petitioner was tried and convicted.) (CT 790 et. seq.) The trial court conducted an evidentiary hearing. We can readily glean petitioner's attorney [William Daley] worked on Roman Jr's. case in the absence of Linda Fullerton, Roman Jr's. attorney (RT 1386-87). Daley met with Roman Jr. on several occasions discussing various aspects of the case. (RT 1356-1363.) Shortly, thereafter Daley notified Fullerton, that he had been retained to represent her client. (RT 1443-44.)

The defense proffered Jeff Bradley, a Contra Costa County public defender since 1974. He elucidated the "conflict of interest" most affirmatively, averring the cross-examination of Roman Jr. seemed "to be no effort to discredit Junior at all." (RT 1626). A thorough cross-examination would have violated attorney-client privilege. (RT 1664).

Following additional briefing the Court ruled petitioner was not disadvantaged in anyway. (RT 1720-21).

An actual conflict of interest results if the defense attorney was required to make a choice of advancing his own interest to the detriment of his client's interest. An adverse effect occurs when an attorney's lapse in representation contrary to the Defendant's interest. Prejudice is presumed.

Petitioner asserts the state-court determination is an "unreasonable" or "contrary" application of federal law as determined by the United States Supreme Court, requiring reversal or in the alternative a federal evidentiary hearing. [28 U.S.C. §2254(d)(1),(e)(2)].

CLAIM THREE: PETITIONER'S RIGHT TO DUE PROCESS, A FAIR TRIAL AND TO AN IMPARTIAL JURY WAS SEVERELY ABRIDGED BY THE PROSECUTOR'S REPEATED MISCONDUCT CONTUMACIOUS TO THE UNITED STATES CONSTITUTION AMENDMENT FOURTEEN.

Supporting Facts: A) During trial the prosecutor, over the court's antecedent ruling and counsel's objection[s], repeatedly referred to inadmissible prior crime evidence prejudicial to petitioner. In limine, it was decided that petitioner's prior convictions for robbery from 1971 or earlier would not be put before the jury. (RT 783). Only a violation of Vehicle Code section 10851, would be allowed, with the caveat petitioner testified. (RT 785). However, during the testimony of defense character witness Frank Kellom the prosecutor asked, viz, did you know petitioner had gone to prison for a robbery where he stuck a gun in someone's face? (RT 779-800). Counsel belatedly objected and the court limited the prosecution's questioning to the fact of a conviction, no facts of the crime. (RT 800).

Regardless, the prosecutor repeatedly persisted in asking defense character witness[es] prejudicial inadmissible details of the prior robbery from 30 years ago. (RT 802,810). Petitioner suffered prejudice not only bringing forth facts not in evidence it eluded to the prosecutor had access to information they did not.

B) The prosecutor's continued misconduct i.e., using petitioner's past convictions improperly in closing argument

suggesting petitioner lied to Dr. Lerchin about his past. (RT 1262). Impugning petitioner's veracity with inadmissible testimony, now introduced to evidence. The state court determination that this evidence was derived from Dr. Lerchin's testimony belies the historical record.

C) The prosecution during closing argument interposed his personal belief in the reliability of his witness's, stating, "I believe..." The state-court, arrogated its own conjecture inferring what the prosecutor actually meant by stating, "I believe..", i.e., he was speaking for the People. This does not remotely palliate the statement nor does the state court's proffered sophistry. Further attempting to manipulate the claim, the court states vouching is an attempt to bolster the credibility of [a] witness[es] by reference to facts outside the record. That's exactly what the prosecutor did. Inferring he "believed," implied he knew something the jury did not. To opine these words were stricken or an objection sustained, does not alleviate the prosecutor's egregious efforts in sustaining a conviction. Notwithstanding, you cannot unring a bell. The crux of the case was a credibility test. Evidence of petitioner's nefarious past pervaded the trial with unfairness, requiring reversal. [28 U.S.C. §2254(d).]

CLAIM FOUR: PETITIONER WAS DENIED HIS RIGHT TO COUNSEL, UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Supporting Facts: Petitioner's brother testified as a character witness for the defense. The prosecutor asked him various questions concerning petitioner's prior record. Immediately after trial counsel convinced the court to exclude all but-one prior for impeachment purposes, (correlative with prosecutorial

misconduct raised ante.) Although a prosecutor may inquire whether defense witness[es] were aware of a defendant's prior convictions, the court's discretion under Evid. Code §352 to exclude the prior convictions was pellucid. Counsel's failure to timely object severely prejudiced the defense, promulgating to the trier of fact petitioner's sorted past, violent crimes and all, over the course of several decades. Counsel's failure to object cannot be deemed a strategic decision. Counsel's deficient performance under prevailing norms undermined confidence in the verdict, requiring reversal or in the alternative [plenary] evidentiary proceedings. [28 U.S.C. §2254(d),(e)(2)].

CLAIM FIVE: THE CUMULATIVE EFFECT OF THE ERROR[S] INFECTED THE TRIAL WITH UNFAIRNESS, VITIATING DUE PROCESS OF LAW.

Supporting Facts: We must acquiesce in totality of the circumstances i.e., the "substantial" evidence proffered the government's modicum of independent evidence linking petitioner to the crime, correlative with the assignments of error proffered ante, resulted in a fundamentally unfair trial. Trial counsel's limited investigation and cross-examination of Roman Jr.; Counsel's failure to lodge a timely-objection correlative with questioning petitioner's character witness[es]; the government attorney going way beyond the succinct fact of the prior, contumacious to the court's preceding ruling; arguing facts not in evidence, going beyond the record, implying petitioner lied to Dr. Lerchin apposite to the prior [in-admissible] evidence; vouching for the credibility of the government witnesses, stating "...I believe...," clearly an attempt to bolster the accomplices/government witnesses

credibility, with implied knowledge of facts extraneous to the record. In a case where the only percipient testimony is two accomplice's corroborating each other with compulsory testimony correlative with their plea agreement[s], the cumulative errors militated fundamental fairness, requiring reversal under our Constitutional framework of jurisprudence. [28 U.S.C. §2254(d)].

1 List, by name and citation only, any cases that you think are close factually to yours so that they  
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning  
3 of these cases:

4 \_\_\_\_\_  
5 \_\_\_\_\_  
6 \_\_\_\_\_

7 Do you have an attorney for this petition? Yes \_\_\_\_\_ No XX

8 If you do, give the name and address of your attorney:  
9 \_\_\_\_\_

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in  
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12 Executed on February 25, 2008

13 Date

14 Signature of Petitioner

Roman Sunday Jr.

15  
16  
17  
18  
19  
20 (Rev. 6/02)

21  
22  
23  
24  
25  
26  
27  
28

# **EXHIBIT A**

Court of Appeal, First Appellate District, Division Five - No. A104520  
S135861

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

---

THE PEOPLE, Plaintiff and Respondent,

v.

ROMAN SUNDAY, SR., Defendant and Appellant.

---

Petition for review DENIED.

**SUPREME COURT  
FILED**

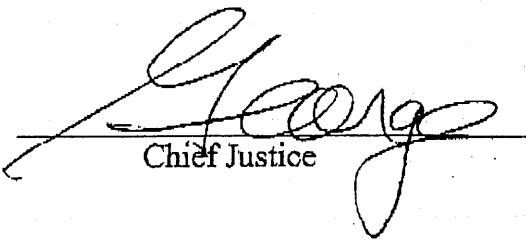
DEC 12 2006

Frederick K. Ohlrich Clerk

*Ale* DEPUTY

---

Chief Justice



Court of Appeal, First Appellate District, Division Five - No. A104520  
S135861

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

---

THE PEOPLE, Plaintiff and Respondent,

v.

ROMAN SUNDAY, SR., Defendant and Appellant.

---

Petition for review DENIED.

**SUPREME COURT  
FILED**

OCT 12 2005

Frederick K. Ohlrich Clerk

*[Signature]* DEPUTY

*George*  
Chief Justice

**S152252**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

---

---

In re ROMAN SUNDAY, SR., on Habeas Corpus

---

The petition for writ of habeas corpus is denied. (See *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

**SUPREME COURT**  
**FILED**

SEP 12 2007

Frederick K. Ohlrich Clerk

---

Deputy

**GEORGE**

---

Chief Justice

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby declare and state that, I am over the age of eighteen (18) years old and I (am) a party to the within cause of action that on this 1, day of March, 2008, I placed the below named legal documents in the United States Mail:

First Amended Petition for writ of Habeas Corpus

---

---

---

---

for which are addressed to the below named parties/persons:

1. United States District Court  
Northern District of California  
450 Golden Gate Avenue  
P.O. Box 36060  
San Francisco, Ca. 94102
2. DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
455 GOLDEN GATE AVE., SUITE 11000  
SAN FRANCISCO, CA 94102-7004
- 3.
- 4.

I, hereby declare under the penalty of perjury of the laws of the State of California, and the United States, that the above certificate of service is true and correct to the best of my knowledge and recollection.

Roman Sunday Jr.  
DECLARANT

Case # (if applicable): C-07-5308 SBA(PR)3/1, 2008

To: CLERK OF THE COURT  
 SUPERIOR COURT  
 COURT OF APPEAL  
 CALIFORNIA SUPREME COURT

FEDERAL DISTRICT COURT  
 FEDERAL COURT OF APPEAL  
 U.S. SUPREME COURT

From: Roman Sunday Sr.  
 California State Prison - Solano  
 Housing: 1/106  
 P.O. Box 4000  
 Vacaville, California 95696-4000

CDC #: V-11338

Re:  PETITION FOR WRIT OF HABEAS CORPUS  
 PETITION FOR REHEARING/RECONSIDERATION  
 PETITION FOR REVIEW  
 BRIEF ON APPEAL  
 MOTION TO COURT

Case:  IN RE \_\_\_\_\_  
 PEOPLE v. \_\_\_\_\_  
 OTHER: Sunday v. Sisto

Dear Clerk:

I am presently incarcerated at the California State Prison - Solano, in Vacaville. Due to my incarceration, indigency or minimal funds, and the current policy of the California Department of Corrections as stated in Deputy Director Memorandum 15/04, I cannot provide the required number of copies as required by the Rules of Court.

Therefore, I must respectfully request that the court make the required additional copies and to serve any required copies on other parties as necessary.

Furthermore, please send a conformed copy of the documents back to me as a receipt of filing. I apologize for any inconvenience that this may have caused.

Respectfully submitted,

Roman Sunday Sr.

Roman Shirley Jr. # V-11338  
P.O. Box 4000  
Visalia, CA 93296-4000  
1/106

LEGAL MAIL

CSP SOLANO  
STATE PRISON



United States District Court  
Northern District of California  
450 Golden Gate Ave.  
P.O. Box 36000  
San Francisco, CA 94102